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In the Supreme Court of the United States

OCTOBER TERM, 1981

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether rules in a tariff of a common carrier by water imposing on the users of that carrier's services limitations related to the availability and handling of cargo containers are exempt from regulation by the Federal Maritime Commission because such rules are derived from a collective bargaining agreement.*

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*This brief is filed on behalf of the Federal Maritime Commission and the United States. Both were parties in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 672 F. 2d 171. The Report and Order of the Federal Maritime Commission (Pet. App. 48a-60a) and the Initial Decision (Pet. App. 61a-120a) are reported at 21 F.M.C. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 121a-122a) was entered on March 2, 1982. The petition for a writ of certiorari was filed on May 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The relevant statutes are set forth at Pet. App. 123a-132a.

STATEMENT

1. When it started operations in 1974, the Puerto Rico Maritime Shipping Authority (PRMSA), a common carrier by water regulated by the Federal Maritime Commission (FMC or Commission), adopted in its tariff certain rules on the use of containers. Those rules required that any containerized shipment moving from or to points within 50 miles of any port must be "stuffed" (loaded) or "stripped" (unloaded) by longshoremen on the pier, unless its contents: (1) were those of a single beneficial owner and loaded or unloaded at the owner's premises by the owner's employees, (2) were stored at regular rates at a public warehouse for 30 days prior to distribution, or (3) consisted of mail, household goods, or personal effects of military personnel (Pet. App. 11a-12a, 64a-65a, 90a). The tariff also provided that the carrier would not provide containers to any consolidator[1] or other person within the 50-mile zone whose shipments would not come within one of those exceptions (*id.* at 13a, 102a-103a), and any nonconforming shipment would be stripped and restuffed before it could be loaded aboard ship, a function for which the shipper would be required to pay a "transfer charge" (*id.* at 66a). If a nonconforming container were not stripped and restuffed at the pier, the shipper would have to pay "liquidated damages" of $1,000 per container (*id.* at 65a-66a).

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[1] A consolidator combines the goods of various shippers into a single container and delivers the container to the pier. See Pet. App. 6a-7a.

Except to the extent they passed on labor costs and liquidated damages to shippers, these tariff rules were copied *verbatim* from a 1974 collective bargaining agreement with the International Longshoremen's Association (ILA), to which PRMSA was a party (Pet. App. 14a-15a).[2]

2. The Commission found, after an evidentiary hearing, that the tariff rules were unjustly discriminatory and preferential and imposed unreasonable practices and charges on shippers, in violation of Sections 14, 16, and 18(a) of the Shipping Act of 1916 and Section 4 of the Intercoastal Shipping Act of 1933, 46 U.S.C. 812, 815, 817(a), and 845a (Pet. App. 59a, 120a). It recognized that the ILA had sought through the collectively-bargained limitations on availability and handling of containers (hereinafter "50-mile rule") to preserve work that it claimed was historically done by longshoremen (*id.* at 80a-90a), and presumed that the 50-mile rule was lawful under the labor statutes (*id.* at 55a, 107a). It held, however, that this purpose did not justify the imposition of unreasonable and discriminatory tariff rules upon certain classes of shippers, particularly small shippers not able to tender or receive full container loads, and those tendering full container loads who did not have their own employees to load or unload containers (*id.* at 53a-55a, 99a-107a). The FMC found that implementation of PRMSA's tariff rules has serious detrimental consequences, such as forcing one consolidator out of business at two ports, causing another to curtail its service and lose customers, and making a third temporarily cease operations at one port (*id.* at 95a-99a). Such discrimination against consolidators was found to have an adverse impact on the underlying small shippers (*id.* at 100a-101a).

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[2]This was the same collective bargaining agreement before the Court in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980).

Although absent their roots in the collective bargaining agreement PRMSA's tariff rules would have been unlawful because they violated PRMSA's basic common carrier obligation to provide transportation service in a reasonable and nondiscriminatory fashion, the Commission considered exempting the rules from the agency's jurisdiction because of their labor origins. It noted, however, that neither a tariff implementing a collective bargaining agreement nor the collective bargaining agreement itself was *per se* exempt from FMC jurisdiction (Pet. App. 55a-59a, 108a-113a, 114a-117a). Weighing the policies involved, the FMC found that assertion of jurisdiction over a single carrier's tariff would not establish Commission jurisdiction over the collective bargaining process, nor would it create a requirement of pre-implementation approval for agreements (*id.* at 55a-59a, 108a, 112a-113a). On the other hand, PRMSA's tariff imposed terms on persons outside the collective bargaining unit, and those terms affected PRMSA's basic common carrier obligation. In these circumstances the Commission concluded that PRMSA must perform its common carrier obligations in a reasonable and nondiscriminatory fashion regardless of the provisions of the collective bargaining agreement (*id.* at 52a-55a, 108a-113a). To ensure minimal interference with labor concerns, however, the Commission allowed PRMSA 30 days in which to cancel its rules and to fashion its own amendments in conformity with the Commission's decision rather than immediately striking the offending provision from PRMSA's tariff (*id.* at 59a).

3. On a petition for review, the court of appeals affirmed the jurisdiction of the Commission over PRMSA's tariff rules (Pet. App. 4a, 18a-38a, 40a-46a).[3]

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[3]The court also retained jurisdiction of the case, and *sua sponte*, remanded the record to the Commission for additional consideration of the question of violation of the shipping statutes in light of this Court's

The court analyzed the purpose and background of the 50-mile rule in the collective bargaining agreement (Pet. App. 4a-10a), as well as its effects on longshoremen and on shippers (*id.* at 11a-14a), noting that there was a basic difference in the function and effect of the rules in the carrier/union and the carrier/shipper contexts (*id.* at 21a, 37a-38a; footnotes omitted):

> The [tariff] Rules govern the relationship between labor and management; incorporated into tariff provisions filed by steamship companies, they also govern the relationship between shipping customers and steamship operators. * * * [Since] the Rules have direct and probable effects on shippers' interests and on competition in the shipping industry, both of which are subject to FMC regulation * * * we are unable to conclude that the shipping interests are either indirect or insignificant in relation to collective bargaining factors. Therefore, the FMC has jurisdiction to consider the legality of the Rules on Containers under the shipping laws.

The court found it unnecessary to decide whether the Maritime Labor Agreements Act of 1980 (MLAA), Pub. L. No. 96-325, 94 Stat. 1021 *et seq.*, which modified Commission jurisdiction over collective bargaining and related agreements, had also removed the Commission's jurisdiction

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decisions in *FMC* v. *Pacific Maritime Association*, 435 U.S. 40 (1978), and *NLRB* v. *International Longshoremen's Association*, *supra* (Pet. App. 39a). Judge MacKinnon dissented from the remand since there had been no challenge on appeal to anything other than the Commission's jurisdiction (Pet. App. 18a), and he believed there was nothing in either decision that required reconsideration by the Commission (*id.* at 46a-47a).

over PRMSA's tariff,[4] because that statute provides that it "shall not affect * * * formal Commission proceedings commenced prior to the date of enactment of this Act" (Section 6, 94 Stat. 1022; Pet. App. 26a, 126a). The court also declined to decide whether the principles governing exemption of agreements from Section 15 of the Shipping Act, 46 U.S.C. 814, necessarily applied to tariff provisions as opposed to provisions in collective bargaining agreements. In this regard, the court noted that even if Section 15 exemption principles apply, the tariff's imposition of restrictive terms on the users of PRMSA's transportation services would defeat a claim of exemption (Pet. App. 34a-38a; see also *id.* at 55a-59a, 114a-117a).[5]

Judge MacKinnon concurred in the court's conclusions with respect to the MLAA and the Commission's jurisdiction over PRMSA's tariff rules (Pet. App. 40a). He concluded, however, that there was no exemption under the shipping statutes for activities other than those under Section 15, and that the Commission in such cases should assert jurisdiction over such labor related activities, weighing the

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[4]Section 5 of the MLAA provides that "* * * nothing in this section shall be construed as providing an exemption from the provisions of * * * [the shipping statutes] for any rates, charges, regulations, or practices of a common carrier by water * * * which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement" (94 Stat. 1022; Pet. App. 125a-126a).

[5]The Commission had argued that when a tariff rather than a provision in a collective bargaining agreement is directly involved, there is no exemption as such from the shipping statutes. Rather, the Commission argued, it would consider labor policy as a factor in determining whether a practice is unjust or unreasonable and in selecting the form of relief to be granted. See, *e.g.*, *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 170 (1962); Pet. App. 34a-35a; see also *id.* at 53a-55a, 104a-113a. The Commission had also argued that, assuming arguendo Section 15 principles apply, PRMSA's tariff was not exempt from the agency's jurisdiction, and that it had so found (Pet. App. 35a; see also *id.* at 55a-59a, 114a-117a).

labor background and effects as factors to be considered in determining the lawfulness of such activities (*id.* at 40a-46a). Assuming that the same labor exemption principles applied to tariffs as to labor agreements, he agreed with the court's conclusion in denying an exemption here (*id.* at 46a).

4. Following remand of the record by the court of appeals, the Commission reconsidered and reaffirmed its original findings of violation. The record has now been returned to the court of appeals and the parties have filed cross motions for summary disposition.

The substantive controversy underlying these cases is also the subject of other pending proceedings. In its related Docket No. 81-11, the Commission is conducting a broad investigation of several carriers to determine whether they may lawfully impose on shippers the 50-mile provisions in their present collective bargaining agreements (Pet. App. 25a n.98). It has issued an "Interim Report and Order" in No. 81-11 holding that the MLAA preserved its jurisdiction over such provisions when imposed by carriers against shippers, even when the carriers failed to incorporate the rules in their tariffs, and it has referred the issue of violations to an Administrative Law Judge for evidentiary proceedings. The petitioners here as well as other parties to that proceeding have appealed the "Interim Report and Order" to the court of appeals. *New York Shipping Association* v. *FMC*, No. 82-1347 (D.C. Cir., filed Mar. 31, 1982).[6]

The validity of 50-mile rules in collective bargaining agreements under the labor laws is still in issue before the NLRB following remand by this Court in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980).

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[6]On June 21, 1982, the court of appeals granted petitioners' motion to have those proceedings deferred until this Court rules on the pending petition.

On September 29, 1981, an Administrative Law Judge rendered an initial decision upholding the validity of the rules in some respects (Pet. App. 150a-367a),[7] but, pursuant to an injunction obtained by the NLRB, implementation of the rules has been stayed since February 24, 1981, pending the NLRB's final determination. See *Pascarell* v. *New York Shipping Association*, No. 81-13 (D.N.J.), aff'd, 650 F. 2d 19 (3d Cir.), cert. denied, No. 80-2095 (Oct. 5, 1981).[8]

ARGUMENT

The interlocutory decision of the court of appeals, under a statutory structure that has since been revised, does not warrant review by this Court. In any event, the decision of the court of appeals was correct and does not conflict with any decision of any other court of appeals.

1. Given the court of appeals' remand of the record for the Commission to determine the issue of statutory violation, the decision on exemption challenged in the petition is of an interlocutory nature and not suitable for immediate review. *E.g., Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916). In fact, the proceedings on remand have concluded and the case is now pending in the court of appeals for decision on the merits. Should petitioners prevail on the merits there would be no cause to review the decision below. On the other hand, should the questions now pending in the

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[7]The NLRB Administrative Law Judge, while upholding the rules under the labor laws in some respects, recognized that Shipping Act standards and policies were different (Pet. App. 21a, 268a).

[8]Antitrust actions based on the 50-mile rules have been stayed pending resolution of the proceedings before the NLRB. See, *e.g., Consolidated Express, Inc.* v. *New York Shipping Association*, 641 F. 2d 90 (3d Cir.), mandamus and prohibition denied *sub nom. In re International Longshoremen's Association*, 451 U.S. 905 (1981).

court of appeals be decided adversely to petitioners, the exemption issue—the only question presented in the petition—may be reviewed by writ of certiorari after a final decision of the court of appeals on the violation issue. See *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Moreover, no special circumstances warrant interlocutory review here. Implementation of the 50-mile rule has been enjoined pending a decision by the NLRB on the legality of the underlying collective bargaining contract provisions, and the shipping law violation issue is already back before the court of appeals in this case. Thus, even if the decision below merited review by this Court, the current petition would be premature.

In any event, the specific issue presented by this proceeding will never arise again in the same legal context in which it appears here. The MLAA, enacted in 1980, is applicable to future proceedings of this nature, and, as noted above, the petitioners here have already initiated proceedings to secure a judicial interpretation of that statute.

2. Contrary to petitioners' contention (Pet. 11-12), *Intercontinental Container Transport Corp.* v. *New York Shipping Association*, 426 F. 2d 884 (2d Cir. 1970) ("*ICTC*"), and *Consolidated Express, Inc.* v. *New York Shipping Association*, 602 F. 2d 494 (3d Cir. 1979), vacated and remanded, 448 U.S. 902 (1980) ("*Conex*"), do not conflict with the decision below. Both *ICTC* and *Conex* rejected the argument that the 50-mile rule in a collective bargaining agreement was subject to the antitrust laws solely because it had an adverse effect on off-pier container station operators who competed with employer signatories for the work of stuffing and stripping containers. The issue in this case is entirely different. First, those cases dealt with the question of exemption from the antitrust laws not the shipping laws. As this Court explained in *FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 63 (1978) ("*PMA*"):

> it will not necessarily be a misapplication of the [shipping] statutes if the exemption for collective-bargaining contracts from Shipping Act requirements is not always exactly congruent with the so-called labor exemption from the antitrust laws * * *.

Once a carrier implements the labor agreement by incorporating its terms into tariff rules, that action must be weighed against the policies underlying the shipping statutes. Those statutes were designed to protect the competitive interests of shippers by regulating the carrier-shipper relationship, and they have historically extended this protection to freight consolidators and their underlying shippers. See, *e.g.*, *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911). Thus the Commission and the court of appeals, having necessarily found that the tariff rules directly imposed terms on shippers and substantially affected shipping interests which the FMC is charged with regulating, properly concluded that they were not exempt from Shipping Act regulation (Pet. App. 37a-38a, 59a, 106a 107a).

Moreover, the labor exemption to the antitrust laws is not a spontaneous judicial construct, but derives from express legislative grants of antitrust immunity and the practical need to accommodate the operation of laws which permit the "eliminat[ion] of competition over wages and working conditions" and those which prohibit anticompetitive agreements in the business market. *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 621-622 (1975). Similarly, this Court found a basis for a labor exemption from Section 15 of the Shipping Act, 46 U.S.C. 814, in *PMA*, 435 U.S. at 57-58. Petitioners have adduced no express statutory exemption from the shipping law provisions applicable to this case, nor any statutory

directive that would guide the courts or the agency in deciding whether a union's interest in negotiating a particular work preservation formula should take precedence over the FMC's mandate to protect shippers from discrimination and unreasonable practices by common carriers and terminal operators. The rules applicable to commercial agreements in general should not necessarily be engrafted onto statutory regimes enacted precisely because of the special role that common carriers play in an industrial economy. Under such circumstances, it behooves the Commission to be sensitive to labor interests in shaping any relief to be granted (*Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962)), but the court of appeals was entirely correct in concluding that the agency did not lose jurisdiction "in the first instance [to] determine whether, because of certain compelling considerations, a carrier is relieved of its usual statutory duty." *Carpenters' Union* v. *NLRB*, 357 U.S. 93, 109 (1958). Because a union and an employer "must bargain does not mean that the agreement reached may disregard other laws." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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